ABT CONSTRUCTION SDN BHD & ANOR A

v.

TRIBUNAL TUNTUTAN PEMBELI RUMAH & ORS

HIGH COURT MALAYA, PULAU PINANG B
VARGHESE GEORGE J
[JUDICIAL REVIEW NO: 25-10-01-2012]
21 DECEMBER 2012

CIVIL PROCEDURE: *Judicial review - High Court - Contractor/vendor unlicensed housing developer - Application to quash award of Homebuyer Tribunal - Whether Tribunal had jurisdiction to deal with purchaser's claim - Whether Tribunal's jurisdiction limited to cause of action which arose between home buyer and licensed housing developer - Housing Development (Control and Licensing) Act 1966, s. 16N(2)* C D

CONTRACT: *Housing development - Sale and purchase agreement - Interpretation of sale and purchase agreement - Whether Homebuyer Tribunal could rewrite terms of sale and purchase agreement - Whether terms in sale and purchase agreement could be replaced with terms as in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 - Terms on handing over of vacant possession contradicted with Schedule G - Whether Schedule G prevailed against agreement* E

LAND LAW: *Housing developers - "Housing development", meaning of - Whether contractor/vendor a "developer" within s. 3 of Housing Development (Control and Licensing) Act 1966 - Whether provisions applied to housing developers who neglected to obtain licence - Whether powers of Tribunal intertwined with provisions of 1966 Act* F G

This was an application under O. 53 of the Rules of the High Court 1980 ('RHC') to quash the award of the first respondent, the Tribunal for Home Buyer Claims ('Tribunal'). The applicants/appellants were the contractor and vendor whilst the second and third respondents were the purchaser of a bungalow lot. The H Tribunal had allowed the purchaser's claim for late delivery of the completed bungalow and in computing the sum awarded to the purchaser, the Tribunal had also set off the counterclaim filed by the appellants to recover the agreed interest accrued on late I

A settlement of progress payments by the purchaser. The appellants contended that the Tribunal had acted in excess of its jurisdiction when it dealt with the purchaser's claim because the appellants were not a 'licensed housing developer' and pursuant to s. 16N(2) of the Housing Development (Control and Licensing) Act 1966
B (the 'HDA') the tribunal's jurisdiction was limited to only a claim that was based on a cause of action which arose from the sale and purchase agreement entered between a home buyer and a licensed housing developer. It was also contended that the tribunal could not rewrite the terms of the SPA that had been
C freely concluded as between the parties. The issues that arose, *inter alia,* were: (i) whether the activity as provided in the SPA, which involved the contractor/vendor, was a housing development undertaken by a housing developer within the meaning of the terms as defined in the HDA; (ii) whether a party engaged in a
D housing development, who failed to obtain a license under the HDA, could rely on their unlicensed state to avoid being subjected to tribunal proceedings; and (iii) whether the High Court should allow the application for judicial review.

E **Held (dismissing application with costs):**

(1) The features of a housing development were all encompassed in the terms of the SPA. The terms of the SPA were identical to the terms of the contract of sale stated in Schedule G of
F the Regulations. Clause 7 of Schedule G had been reproduced *in toto* in cl. 6 of the SPA. The fact that the project undertaken by the contractor/vendor involved the sale and construction of more than four housing lots, was therefore clearly within the definition of the HDA. It did not matter that
G the accommodation were constructed at separate times. (paras 22 & 23)

(2) The fact that the contractor and the vendor chose to refer themselves separately in the SPA did not detract them from the legal effect that, both *de facto* and *de jure*, they were
H indeed a housing developer. The definition required an examination of the substance of the terms and if the persons were engaged in undertaking or causing to be undertaken a housing development, then they were a housing developer for the purposes of the HDA. It was irrespective of how they
I chose to be described in the sale and purchase agreement.

The Tribunal was therefore not in error in concluding that the contractor/vendor was collectively a housing developer in respect of the SPA with the purchaser. (paras 24 & 25)

(3) If the phrase 'licensed housing developer' was interpreted harmoniously with the wider objectives and legislative intent behind the provisions of the HDA, there was no reason why it should not also include a housing developer who has required, under the law, to be licensed but had failed or neglected to do so. Such failure to apply and be licensed should not be accepted and condoned by the courts as a legitimate escape route from the purview of the Tribunal under s. 16N(2) of the HDA. The specific purpose of that provision was to deal with claim from home buyers who had a claim that they had become victims of unscrupulous housing developers. (para 27)

(4) The Tribunal was established under the HDA to deal specifically with claims lodged by a home buyer. This avenue for remedy, statutorily provided to a home buyer, and should not be allowed to be defeated merely because the party involved in the housing development, by choice, was not a licensed housing developer. The establishment of the Tribunal was not independent of the provisions of the HDA. The extent of the Tribunal's powers and jurisdiction was intertwined with the objects and provisions of the HDA and ought not be treated as isolated from the other provisions of the HDA. The phrase 'licensed housing developer' also included persons or entities who were required to be licensed under the HDA to undertake a housing development but had not done so. Therefore, it included the contractor/vendor though unlicensed under the HDA. Thus, the decision of the Tribunal to seize jurisdiction and to deal with the purchaser's claim was not tainted with illegality or procedural impropriety. (paras 28-30)

(5) Since the contractor/vendor were housing developer engaged in housing development, the Tribunal was not in error in holding that the Regulation and its mandatory provisions applied to the contractor/vendor. The handing over of vacant possession clause that allowed 36 months from the date of

approval plan was in direct contravention of Schedule G clauses which related to the delivery of vacant possession. The contractor/vendor could not be allowed to contract out or circumvent Schedule G clause. Therefore, Schedule G clause should prevail where the terms in a sale and purchase agreement between a housing developer and a purchaser was not consistent with the Schedule G clauses. (paras 35 & 36)

(6) The court in dealing with a judicial review application was not sitting in appeal against the impugned decision or award but only exercised the court's supervisory powers over subordinate tribunals. To merit curial intervention, the applicant had to establish that errors in the nature of illegality, irrationality or procedural impropriety had been committed during the decision making process. In the present case, the decision and award of the tribunal was not tainted by any illegality, irrationality or procedural impropriety. (paras 37 & 39)

Case(s) referred to:

Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia [2002] 4 CLJ 689 CA ***(refd)***

Foong Seong Equipment Sdn Bhd v. Keris Properties (Pk) Sdn Bhd [2011] 4 CLJ 42 CA ***(refd)***

Lim Chon Jet & Ors v. Yusen Jaya Sdn Bhd [2011] 8 CLJ 598 HC ***(refd)***

Nothman v. Barnet London Borough Council [1978] 1 WLR 220 ***(refd)***

Pepper v. Hart [1993] 1 All ER 42 ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

Sheila Sangar v. Proton Edar Sdn Bhd & Anor [2009] 8 CLJ 200 HC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Tan & Tan Development Sdn Bhd lwn. PP [1994] 4 CLJ 74 HC ***(refd)***

Telekom Malaysia Bhd v. Tribunal Tuntutan Pengguna & Anor [2007] 1 CLJ 300 HC ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, ss. 3, 5, 16A, 16L, 16M, 16N(2)(b), 18

Interpretation Acts 1948 and 1967, s. 17A

Legal Profession Act 1976, s. 13(1)

Rules of the High Court 1980, O. 53

For the applicants - Lim Kean Mui (Wong Mei Wei Melissa with her); M/s Sunny Khoo & Co
For the 1st respondent - Zaharuddin Md Isa; SFC
For the 2nd & 3rd respondents - Murshida; M/s Chew Ju Li & Co

Reported by Sandra Gabriel

JUDGMENT

Varghese George J:

Introduction

[1] This was an application brought under O. 53 of the Rules of the High Court 1980 ('RHC 1980') to quash the award or decision of the President of the Tribunal for Homebuyer Claims (tribunal) dated 19 December 2011. At the tribunal proceedings, the applicants were the respondents cited in a claim filed by Mohd Fauzi b Abdul Latif and Zainab bt Ismail in respect of or arising from a 'sale and purchase agreement' dated 17 August 2004 (the SPA).

[2] The first applicant was a party to the SPA and was referred in the SPA as 'the contractor'. The second applicant was also a party to SPA and referred to there as 'the vendor'.

For convenience, both the applicants will be collectively referred to in this grounds of decision as 'the contractor/the vendor'.

[3] Mohd Fauzi b Abdul Latif and Zainab bt Ismail were in the SPA jointly referred as 'the purchaser' and that description will be adopted to refer to them in this grounds of decision.

[4] The heading of the SPA was in the following terms: SALE AND PURCHASE AGREEMENT (LAND AND BUILDING). It could be surmised from even a cursory perusal of the contents of the SPA that the pith and substance of the SPA was the sale, construction and disposal jointly by the contractor/the vendor of a completed bungalow on subdivided plot No. 95 on titled land HS (M) 410 PT 543, Mukim Jawi District of Pokok Sena, Kedah (the bungalow). The total 'build-up' area of the bungalow as per the drawings attached to the SPA was to be 1,322 sq ft.

[5] The tribunal had allowed the purchaser's claim for late delivery of the completed bungalow and in computing the sum awarded to the purchaser, the tribunal had also set off the counter-claim filed by the contractor/the vendor to recover the agreed interest accrued on late settlement of progress payments by the purchaser.

[6] There were twenty one other similar applications for judicial review of the tribunal's decision which had been filed by the contractor/the vendor (as set out in the schedule to this grounds of decision). They were in respect of identical sale and purchase agreements entered into with other purchasers of similar to be built properties in what had been described as 'Taman Bunga Sena' within a project further described as 'Pusat Komersial Pokok Sena', Alor Setar, Kedah (see exh. LCS5 (Lampiran T) in encl. 2 and exhs. MFAL3 and MFAL4 in encl. 8).

The respective purchasers pursuant to the said 21 other sale and purchase agreements had similarly filed claims against the contractor/the vendor and the tribunal had dealt with them together and allowed those claims as per the terms of the one award of tribunal issued for all those case. The calculation of the amounts due (after set off for counter-claim) in each case was separately derived and ordered by the tribunal to be paid by the contractor/the vendor.

[7] As the principal issues raised in all the judicial review applications by the contractor/the vendor were similar, by agreement of all parties, this instant application was prosecuted as the main or test-case and it was agreed that the outcome here would be accepted and be applicable in respect of the other 21 cases as well.

The Complaint Of The Contractor/The Vendor

[8] The contractor/the vendor's attack against the tribunal's award were essentially two-pronged.

The principle contention was that the tribunal had acted in excess of its jurisdiction when it entertained and dealt with the purchaser's claim. This, it was argued, was because the contractor/the vendor was not a 'licensed housing developer' and

pursuant to s. 16N(2) of the Housing Development (Control and Licensing) Act 1966 (the HDA), the tribunal's jurisdiction was limited to only a claim that was based on a cause of action arising from the sale and purchase agreement entered into between a homebuyer and a 'licensed housing developer'.

[9] The subsidiary contention was that the tribunal could not rewrite the terms of the SPA that had been freely concluded as between the parties. The rights and obligations mutually binding on the parties to the SPA had to be determined as a contract governed by the Contracts Act 1950 and ought not to be replaced or superimposed with the contractual terms as found in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 (the Regulations).

[10] It was not in dispute that the contractor/the vendor were not a 'licensed housing developer'. It was obvious however that the omission to apply for and obtain a licence pursuant to s. 5 of the HDA by the contractor/the vendor (separately or jointly) was a willful one at that. The contractor/vendor's stance was that the SPA provided separately for the contractor to undertake the construction of the bungalow and for the vendor to transfer that portion of the land on which the bungalow was to be constructed. It was also contended that the envisaged construction was only for four units of bungalows at any one time. For these reasons, it was submitted that the contractor/the vendor were not caught within the definition of 'housing developer' or 'housing development' in the HDA.

Counsel for the applicant even suggested that the 'licensed housing developer' for the Taman Bunga Sena residential buildings was some other, namely, one ABT Jaya Holdings Sdn Bhd.

Not Housing Developer - The Jurisdiction Issue

[11] It need to be pointed out that the tribunal was established by amendments introduced to the HDA by Act A1142 of Part VI (Tribunal for Homebuyer Claims) and this came into force on 1 December 2002. Section 16N(2) of the HDA, that was material for our consideration here (as further amended by Act A 1289 (12 April 2007) was in the following terms:

A (2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from a sale and purchase agreement entered into between the homebuyer and **the licensed housing developer** which is brought by a homebuyer not later than twelve months from:

B (a) the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later;

C (b) the expiry date of the defects liability period as set out in the sale and purchase agreement; or

(c) the date of termination of the sale and purchase agreement by either party and such termination occurred before the date of issuance of the certificate of completion and compliance for the housing accommodation or the common facilities of the housing accommodation intended for subdivision, whichever is later. (emphasis added).

[12] The thrust of the submission by counsel for the contractor/ the vendor was that the tribunal could only adjudicate on a E homebuyer's claim, if and only if, the party against whom the claim was brought was a 'licensed housing developer'. What in effect was being urged upon the court was to accord a strict literal reading, to the words 'licensed housing developer' in s. 16N(2) HDA and to hold here that the tribunal had no authority or F power to deal with the purchaser's claim under the SPA, since the contractor/vendor was not a licensed housing developer.

[13] The same argument was taken before the President of the tribunal, who in the 'alasan penghakiman' dealt with it and G rejected the same in the following terms:

Sekiranya dilihat daripada Perjanjian Jual Beli bertarikh 01.09.2004 schedule 2 Reference No.5 - Pelan Tapak, PP1 dan PP2 merancang sesama sendiri untuk membina di atas tapak tersebut lebih daripada empat unit rumah tempat tinggal dan menurut Third H Schedule - Payment of Purchase Price, maka merupakan kumpulan orang yang menjalankan pemajuan perumahan. Justeru PP1 dan PP2 merupakan pemaju perumahan tanpa lesen.

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Maka Perjanjian Jual Beli bertarikh 01.09.2004 adalah tertakluk kepada Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966. Walau pun tidak berlesen (yang menjadi kesalahan di bawah Akta), maka Tribunal Tuntutan Pembeli Rumah mempunyai bidang kuasa untuk mendengar tuntutan yang dibuat oleh pembeli.

[14] In my assessment, the questions at hand for determination, on the issue of jurisdiction that is, boiled down to two core ones, namely:

(a) whether the 'activity' as evidenced by the terms of the SPA in so far as it involved the contractor/the vendor was 'housing development' and/or was being undertaken by a 'housing developer', within the meaning of those terms as defined in the HDA; and

(b) whether a party who was engaged in 'housing development' and who had refused or failed to obtain a licence under the HDA, could rely on their 'unlicensed' state to avoid being subjected to tribunal proceeding under Part VI of the HDA.

Housing Development/Housing Developer

[15] Section 3 (Interpretation) of the HDA provide the following definitions, which were pertinent for the consideration here:

(a) 'housing development'

Prior to Act A1289

> housing development means to develop or construct or cause to be constructed in any manner more than four units of housing accommodation and includes the collection of monies or the carrying on of any building operations for the propose of effecting housing accommodation in, on, over or under any land; *or the sale of more than four units of housing lots by the landowner or his nominee with the view of constructing more than four units of housing accommodation by the said landowner or his nominee;*

After Act A1289

> 'housing development' means to develop or construct or cause to be constructed in any manner whatsoever more than four units of housing accommodation and includes the collection of moneys or the carrying on of any building

A operations for the purpose of erecting housing accommodation in, on, over or under any land; *or the sale of more than four lots of land or building lots with a view of constructing more than four units of housing accommodation;*

(b) 'housing developer'

B 'housing developer' means any person, body of persons company, firm or society **(by whatever name described)**, who or which engages in or carries on or undertake or causes to be undertaken a housing development.

C (c) 'housing accommodation'

Prior to Act A1289

'housing accommodation' includes any building, tenement or messuage which is wholly or principally constructed, adapted or intended **for human habitation or partly for human habitation** and partly for business premises but does not include an accommodation erected on any land designated for or approved for commercial development.

D

E After Act A1289

'housing accommodation' includes any building, tenement or messuage *which is wholly or principally constructed adopted or intended for human habitation or partly for human habitation* and partly for business premises and such other type of accommodation as may be prescribed by the Minister from time to time to be a housing accommodation pursuant to section 3A; (emphasis added)

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[16] Section 5 of the HDA statutorily stipulated that no housing development activity was to be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under the HDA. It was mandatory for such persons or entities engaged in housing development activity to apply for and secure a licence.

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H Failure to secure a licence was an offence (s. 18 HDA) and upon conviction the offender was liable to be fined (RM250,000 to RM500,000) and/or to be imprisoned for a term not exceeding five years. Any director, manager or other official implicated in that offence, likewise upon conviction was liable to improvement (minimum twelve months but not exceeding three years) and to a fine (between RM50,000 to RM250,000) to be personally borne.

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[17] The severity of the penal sanctions that could be imposed if a 'licence' was not applied for and obtained underscored the significance and seriousness behind the objectives of the HDA and its various provisions. As the 'Long Title' to the HDA stated, this statute was "... to provide for the control and licensing of the business of housing development in (Peninsular Malaysia), **the protection of the interest of purchasers** and for matters connected therewith." (emphasis added)

Without a doubt therefore, the legislative intent behind the various provision of the HDA, including the setting up of the tribunal, was to regulate in an orderly manner the business of housing development and to protect the interests of purchasers of housing accommodation.

[18] The questions posed above, namely (but paraphrased further here), whether the contractor/the vendor were undertaking 'housing development' and whether the interpretation to be given to the terms 'licensed housing developer' should be to even include 'unlicensed' housing developer, had to be considered and answered as against the above recited fundamental aspects of the HDA and the objectives behind that statute.

[19] In the Interpretation Acts 1948 and 1967 at s. 17A, the courts in situations like at hand have been enjoined to be guided as follows:

> 17A Regard be had to the purpose of Act.
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> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) should be preferred to a construction that would not promote that purpose or object.

The Court of Appeal in *Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia* [2002] 4 CLJ 689 (which concerned an interpretation of s. 13(1) of the Legal Profession Act 1976 and whether the first appellant was qualified as a master to take on the second appellant as a pupil), speaking through Gopal Sri Ram JCA (as he then was) stated:

A The approach to the interpretation of the Act should be purposive. The purpose of the Act is to protect the public from incompetent members of the legal profession. Once it is accepted that the Act is there to protect the public, a literal interpretation of s. 13(1) would defeat the intention of parliament. Further the modern approach to statutory interpretation is purposive and not literal.
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[20] Lord Griffiths in *Pepper v. Hart* [1993] 1 All ER 42 (HC), as approved in the above decision of the Court of Appeal, had this to say on the point:

C The days have long passed when the courts adopted a strict constructionists view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach, which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation
D was enacted.

[21] Returning then to the first question, whether as per the terms of the SPA, the contractor/the vendor were undertaking on 'housing development' and/or acting as 'housing developer' and
E whether they were under a statutory obligation to obtain a 'licence' for that activity, it was the president of the tribunal's conclusion, with reference in particular to the preamble of the SPA, that the contractor/the vendor were indeed jointly 'housing developer' of the bungalow in question being constructed and sold
F to the purchaser.

To me, the essential features of a housing development were all encompassed in the terms of the SPA, and these included the following:

G (a) there was a project land which was to be subdivided into bungalow lots and 'separate lots';

(b) the contractor had obtained approval of the layout plan from the relevant authorities;

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(c) the contractor and the vendor were to apply for and obtain approval of building plans of the bungalow and thereafter construct and complete the bungalow;

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(d) the vendor (as owner of the land) was to collaborate with the contractor in the supervision of the construction and upon issue of a separate document of title to the said lot, to transfer the title to the lot into the name of the purchaser; and

(e) progressive payments of the agreed purchase price was to follow the completion of the stages of construction of the bungalow and if the purchaser defaulted in any payment of the progress payment within 21 days, interest on late payment would be levied which the purchaser would be liable to pay.

[22] The terms of the SPA, save for three or four clauses, it would also be observed, closely followed the fashion and were identical to the terms of the contract of sale stated in sch. G of the regulations (sale and purchase agreement (land and building)). This was conceded to by counsel for the contractor/the vendor when I highlighted the same.

In fact, cl. 7 in sch. G as to "Purchaser's right to initiate and maintain action in any court of tribunal ..." seems to have been reproduced unintentionally perhaps, *in toto* in cl. 6 of the SPA.

[23] There was also no denying the fact that the project being undertaken by the contractor/the vendor taken on the whole involved the sale of more than four housing lots (pre-amendment) or building lots (post amendment) with a view of constructing more than four units of 'housing accommodation' and was therefore clearly within the definition of 'housing development' in the HDA. (See Plan Tapak in the SPA itself: exh. LCS3 encl. 2)

It did not matter then in my view, whether the 'housing accommodation' were being constructed at separate times, namely only four at a times, as submitted by counsel for the contractor/ the vendor. This was irrelevant and a non-issue for purposes of the said definition which they were clearly caught within. (*Tan & Tan Development Sdn Bhd lwn. PP* [1994] 4 CLJ 74)

[24] The fact that in the SPA 'the contractor' and 'the vendor' chose to refer to themselves accordingly, did not either detract from the legal effect that both *de facto* and *de jure* they were indeed a 'housing developer'. The definition required an examination of the substance of the terms (the rights and obligations) and if the

persons or body of persons were engaged in, carrying on or undertaking or causing to be undertaken a housing development, then they were 'housing developer' under and for purposes of the HDA. This was irrespective of how they chose to be called or the name in which they were described in the relevant sale and purchase agreement.

[25] The president of the tribunal, in my judgment, was therefore not in error or in any way irrational when he concluded that the contractor/the vendor was collectively a 'housing developer' in respect of the SPA with the purchaser.

[26] As regards the second question ('licensed housing developer' includes 'unlicensed' housing developer) apart from the overriding principles or guidelines for interpretation of statutory provisions noted and reproduced above, I found it also helpful to have in mind what Lord Denning MR observed in *Nothman v. Barnet London Borough Council* [1978] 1 WLR 220, which was as follows:

> In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the judges to wring their hand and say: "There is nothing we can do about it.
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> Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind.

[27] Of course if the phrase in s. 16N(2) of the HDA was only 'housing developer' and not 'licensed housing developer' there would not have arisen the controversy such as we had presently here. Nonetheless, if the phrase 'licensed housing developer' was interpreted harmoniously with the wider objectives and legislative intent behind the provisions of the HDA, there was no reason, in my view, why it should not also include a 'housing developer' who was required under the law to be licensed but had failed or neglected to do so.

Such failure or neglect to apply for and be licensed when engaged in, carrying out or undertaking or causing to be undertaken housing development (as clearly discernable from the terms of the concluded sale and purchase agreement with a purchaser) should

not be accepted as or be condoned by the courts as a legitimate escape route from the purview of the tribunal under s. 16N(2) of the HDA. The specific purpose of that provision was to deal with claim from purchasers/homebuyers who had a claim that they had become victims of unscrupulous 'housing developers'.

[28] It must be stressed that the tribunal was established under the HDA to deal specifically with claims lodged by a homebuyer. That was the primary source of jurisdiction of the tribunal - a claim lodged by a house buyer under s. 16L and s. 16M of the HDA. In s. 16A it was provided that a 'homebuyer' meant a purchaser and read together with the definition of 'purchasers' in s. 3 of the HDA it was "any person who purchased housing accommodation or ..."

This avenue for remedy, statutorily provided to a homebuyer, for an expeditious resolution of claims arising from a sale and purchase agreement entered into with persons engaged in housing development, provided claims did not exceed RM50,000 (now), should not be allowed to be defeated merely because the party involved in the housing development, by choice, was not a licensed housing developer.

[29] I was conscious and did take into consideration the fact that this controversy revolved around the extent of jurisdiction of an inferior tribunal established by statute and where the marginal note to that s. 16N was 'limitation of jurisdiction'. However in my considered evaluation, this was not as if the establishment of the tribunal was independent of the provisions of the HDA, by a separate enabling statute that is. In such a case as the latter, perhaps, there might have been some merit in the argument that the limit of the adjudicatory powers should be strictly construed. The extent of the tribunal's powers and jurisdiction was intertwined with the objects and provisions of the HDA.

It ought not to be treated as separate and isolated from the other provisions of the HDA.

[30] Accordingly it was my view applying the principles outlined above, which called for a purposive approach to be taken by the courts in interpretation of statutory provision, and also following the instructive words of Lord Denning quoted above, that if

necessary words have to be read into a statutory provision to prevent it giving rise to an absurd or unjust situation, the phrase 'licensed housing developer' would also include such persons or entities who were required to be licensed under the HDA to undertake housing development but had not done so. In this case, it would include the contractor/vendor, though 'unlicensed' under the HDA.

On this score too, it was my conclusion that the decision of the president of the tribunal to seize jurisdiction and deal with the purchaser's claim was not tainted with illegality or procedural impropriety, as was submitted by counsel for the contractor/vendor.

SPA Must Be Construed As The Contract Binding The Parties And Not The Terms In Sch. G

[31] It was canvassed for the contractor/the vendor that in construing the respective rights and obligation of the parties to the SPA, the parties have to be held to be bound to the express terms set down in the SPA without any amendment or superimposition of other terms that was not mutually agreed by the parties.

The tribunal had ruled in particular that cl. 21(1) of the SPA was not in compliance with and/or was in conflict with the mandatory contractual terms as provided in sch. G form of the contract, namely cl. 23(1) and cl. 25 (the sch. G clauses).

[32] In so far as was material for our purposes now, cl. 21(1) of the SPA (time for handing over vacant possession) provided for vacant possession of the bungalow (building) to be delivered to the purchaser within 36 calendar months from the date of the approved plan.

Schedule G cl. 23(1) (time for delivery of vacant possession) stipulated that vacant possession of the building be handed to the purchaser "... within 24 calendar months from the date of this agreement."

[33] The tribunal applied the '24 month period' for vacant possession to be handed over (as per sch. G cl. 23(1)) and the setting in of the period for liquidated damages for late delivery of vacant possession payable by the contractors/vendor was

calculated to run from the expiry of the 24 months after the date of the SPA until actual delivery of vacant possession in each of the 22 cases.

Further the defects liability period (of 18 months) (in both the SPA and schedule G) was held to only set in after the actual delivery of vacant possession (sch. G cl. 26) respectively in each of the cases and not as stated in the SPA - cl. 14.

It was the finding of the tribunal that in all the cases, the claim had been filed by the purchaser and the other 21 purchasers within 12 months of the expiry of the defects liability period in each case and this was in compliance with s. 16N(2)(b) to confer jurisdiction on the tribunal to adjudicate the respective claims.

[34] Shorn of the other details and particulars, the submission of counsel for the contractor/the vendor was that the time for delivery of vacant possession of the bungalow freely contracted for under the SPA should have been upheld to be 36 months not varied to reduce it to 24 as per the sch. G clauses. The SPA terms, it was contended, were expressly agreed terms and were governed by the provisions of the Contracts Act 1950; the tribunal had no powers to substitute or rewrite that agreed period for vacant possession to be handed over it was submitted.

[35] The tribunal referred to the decision of the Federal Court in *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 and the recent decisions of the High Court in *Lim Chon Jet & Ors v. Yusen Jaya Sdn Bhd* [2011] 8 CLJ 598 to hold that the sch. G clause should prevail where the terms in a sale and purchase agreement between a housing developer and a purchaser was not consistent with the sch. G clauses.

The Court of Appeal in *Foong Seong Equipment Sdn Bhd v. Keris Properties (Pk) Sdn Bhd* [2011] 4 CLJ 42 had occasion to comment on the significance of the sch. G clauses in the following helpful analysis of the foundational basis for strict compliance with the regulation and of the terms in sch. G:

> Section 24 of the Act confers on the Minister the power to make regulations for the purpose of carrying into effect the provisions of the Act. Pursuant thereto, the Housing Development (control and Licensing) Regulations 1989 were brought into existence. Regulation 11 thereof expressly provides for the standard form of contract of sale. It reads:

A 11. Contract of sale

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the sub divisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

A plain reading of the mandatory provisions contained in reg. 11 reveals that it provides for two categories of the standard statutory sale and purchase agreement. The sale and purchase agreement for housing accommodation together with the sub divisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G. In the case of subdivided building, it shall be in Schedule H. The parties thereto are not permitted to contract out of its. As a general rule, compliance with these statutory contracts of sale is mandatory; an exception arises only with the approval of the Controller of Housing, in the form of a certificate in writing, in order to waive or modify the provisions thereof.

[36] After having had held that the contractor/the vendor were housing developer engaged in housing development (and rightfully so, as I have discussed above) the tribunal was not therefore in error to hold that the regulation and its mandatory provisions applied to the contractor/the vendor.

The 'handing over of vacant possession' clause allowing 36 months from date of approved plan was in direct contravention of the sch. G clauses relating to 'delivery of vacant possession' of the completed bungalow. The contractor/the vendor could not and ought not to be allowed to contract out or circumvent that sch. G clause.

The operative terms as between the parties to the SPA in so far as 'Time for delivery of vacant possession' applicable in the circumstances was the sch. G cl. 23.

This was within the law and the tribunal could not be faulted for being irrational either.

Conclusion

[37] The court in dealing with a judicial review application was not sitting in appeal against the impugned decision or award but only exercising the court's supervisory powers over subordinate tribunals. To merit curial intervention the applicant concerned had to establish that 'errors' in the nature of 'illegality', 'irrationality' or 'procedural impropriety' (and maybe 'proportionality') had been committed during the decision making process. (*R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 (CA); *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; *Sheila Sangar v. Proton Edar Sdn Bhd & Anor* [2009] 8 CLJ 200 - Mohamed Arif JC; and *Telekom Malaysia Bhd v. Tribunal Tuntutan Pengguna & Anor* [2007] 1 CLJ 300).

[38] The judicial review court's intervention on the grounds of 'illegality' would be available if it was shown that the decision maker had misconstrued any provision of a statute or misapplied a principle of general law. A decision could be quashed on the basis of 'irrationality' if it was shown that there was no basis to support the finding of fact, or the conclusion reached was diametrically contrary to evidence on record or where the decision maker had asked the wrong questions or taken into consideration irrelevant matters and omitted relevant matters.

[39] In my evaluation of the material before me, and as discussed above, the decision and award of the tribunal was not tainted by any illegality, irrationality or procedural impropriety.

The application was therefore dismissed with costs.

SCHEDULE

NO	CASE NO	PURCHASERS	TRIBUNAL AWARD REFERENCE NO.
1.	25-11-01/2012	AYOB BIN AHMAD	TTPRZU/K/0758/11
2.	25-12-01/2012	LIAW KOK SO	TTPRZU/K/0776/11
3.	25-13-01/2012	CHEN CHE CHONG & OON SIEW YEN	TTPRZU/K/0793/11
4.	25-14-01/2012	LIAU LAI ZU & YEOH CHIANG FOONG	TTPRZU/K/0773/11

SCHEDULE

NO	CASE NO	PURCHASERS	TRIBUNAL AWARD REFERENCE NO.
5.	25-15-01/2012	NORA KASUMA BINTI MOHAMAD	TTPRZU/K/0762/11
6.	25-16-01/2012	MOHD RAZIF BIN MANAP & HUSNA BINTI WAHAB	TTPRZU/K/0756/11
7.	25-17-01/2012	SHAARI BIN ABDUL GHONI & SOPIAH BINTI AHMAD	TTPRZU/K/0753/11
8.	25-18-01/2012	YASAR BIN ABDULLAH	TTPRZU/K/0755/11
9.	25-19-01/2012	AZLINA BINTI AZIZ	TTPRZU/K/0768/11
10.	25-20-01/2012	MARDIAH BINTI MD SAMAN	TTPRZU/K/0767/11
11.	25-21-01/2012	MOHD ZUBIR BIN REJAB @ ABD RAZAK	TTPRZU/K/0759/11
12.	25-22-01/2012	KHOR CHEW KENG	TTPRZU/K/0777/11
13.	25-23-01/2012	MOHAMMAD NASRI BIN CHE MAT	TTPRZU/K/0764/11
14.	25-24-01/2012	WAN DYARUDIN BIN WAN MUSTAPPA	TTPRZU/K/0765/11
15	25-25-01/2012	LIAW GWO JONG	TTPRZU/K/0792/11
16.	25-26-01/2012	USMARDIN BIN MOHD HAMBALI	TTPRZU/K/0765/11
17.	25-27-01/2012	J SUNNY A/L AK JOHN	TTPRZU/K/0757/11
18.	25-28-01/2012	LOW LEE THUAN	TTPRZU/K/0774/11
19.	25-29-01/2012	AZHAR BIN MD JIWA	TTPRZU/K/0760/11
20.	25-30-01/2012	NORLIZA @ RAHAYU BT ABDULLAH	TTPRZU/K/0763/11
21.	25-31-01/2012	LIEW HAN ENG	TTPRZU/K/0775/11